Supreme Court, U. S.
FILED
MAY 1 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

No. 78-1658

BOBBY EUGENE GORDON - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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BOBBY EUGENE GORDON - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Bobby Eugene Gordon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this proceeding on January 8, 1979 and an order overruling petition for rehearing was entered April 3, 1979.

OPINION BELOW

The opinion or order of the Court of Appeals to our knowledge has not been reported appears in the appendix hereto, as does also the order of April 3, 1979 overruling petition for rehearing. Although no written opinion was rendered by the District Court, we are including in the appendix hereto the HEARING FOR PURPOSE OF SENTENCING wherein the District Court rendered a verbal opinion.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 8, 1979. A timely petition for rehearing was denied on April 3, 1979, and this petition for certiorari is being filed within 30 days from this date. This Court's jurisdiction is invoked under 18 U.S.C.A., Section 3231.

QUESTIONS PRESENTED

1. Section 1202(a) Title 18, Appendix U. S. Code provides as follows:

"(a) Any person who—

(1) Has been convicted ..... of a felony,

.....

.....And who receives, possesses, or transports *in commerce or affecting commerce,* after the date of the enactment of this act, any firearm shall be fined not more than $10,000.00 or imprisoned for not more than two years or both." (Emphasis ours)

The indictment charges that, on or about the third day of September, 1977 . . . Bobby Eugene Gordon, having been convicted on February 11, 1964, in the McCracken County Circuit Court, Paducah, Ky., of receiving stolen property, a felony, did have in his possession firearms, [nine shotguns and rifles are specifically described] *which had moved in interstate commerce.*" (Emphasis ours).

Does the indictment which does not allege that Defendent possessed these guns in interstate commerce or affecting interstate commerce but only alleges that they *"had moved in interstate commerce"* state an offense. This is a very pertinent point in that there is no question but that Bobby Eugene Gordon possessed some of these guns. He testified that he did. Our defense was that these hunting guns in plain view in Defendant's family living room which were used solely for hunting and recreational purposes were not "in commerce or affecting commerce".

(2) Bobby Eugene Gordon was convicted in February of 1964 of receiving stolen property. He served his time. In 1968, the law under which he now stands convicted in this case was enacted. Does this law as applied to this Defendant in this case constitute an ex post facto law? Does this prosecution of Bobby Eugene Gordon constitute double jeopardy?

(3) Immediately after the jury panel was sworn, the District Court told the jury that in the indictment it is alleged that Defendant had in his possession firearms after he had allegedly been convicted of a felony, *"which is a felony under the pertinent sections of the United States Code."* (T.Tr., p. 5, lines 19 & 20).

* * * * * * *

". . . *The law says that a person convicted of a felony cannot possess a firearm* . . ." (Emphasis ours) (T.Tr., p. 11, lines 9-14). Does the foregoing erroneous statement of the Presiding Judge at the very onset of the trial require a reversal?

(4) Rule 32 of Rules of Criminal Procedure provides, "before imposing sentence the Court . . . shall address the Defendant personally and ask him if he

wishes to make a statement in his own behalf and to present any information in mitigation of punishment." The District Court failed to follow the foregoing rule. Was this reversible error?

CONSTITUTIONAL PROVISIONS

Article I, Section IX of the United States Constitution provides: "No . . . ex post facto law shall be passed."

Amendment V of the United States Constitution provides: ". . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Does the Federal Gun Control law as interpreted by the District Court and the United States Court of Appeals and as applied to the Defendant in this case violate either or both of the foregoing constitutional provisions?

STATEMENT OF THE CASE

To our knowledge there is no dispute as to the facts. Defendant, Bobby Eugene Gordon, has not killed or injured anybody or attempted to kill or injury anybody. He has not stolen or defrauded anybody or attempted to steal or defraud anybody. And as we interpret the law, he has violated no law. Yet he is being returned to prison. He appeals to this Court.

Defendant, Bobby Eugene Gordon, lives and operates an automobile salvage and used parts lot at 138 Virgie St., Paducah, Ky. and has lived and operated there a salvage and used parts lot for a number of years.

This property has been operated and used as a salvage and used parts lot continuously for more than 38 years. This salvage yard is at the edge of Paducah, part of it being just inside the city limits and part of is being just outside the city limits. This salvage yard is located near the dead end of a dead end street. There are no people living on Virgie St. from Defendant's salvage yard to its dead end. There is another salvage yard, no other businesses.

Bobby Eugene Gordon's home and salvage and used parts business are located on the same premises. Bobby Eugene Gordon is a gentleman. On the evening of September 2, 1977 when two uniformed police officers, Danny Midgett and Don Eberhart, went to the Gordon home and knocked on the door, he invited them in. Into his living room. Upon entering they immediately observed a number of guns—shotguns and rifles—in plain view in the living room. We quote from Officer Don Eberhart's testimony as follows:

> "Q. What happened when you got to the Gordon home?
>
> A. When we arrived at Mr. Gordon's home, we knocked on the door and we were invited in." (Tr. 47, lines 14-16).
>
> . . . . . .
>
> "Q. . . . When you went there, he invited you in; is that right?
>
> A. That's correct, yes sir.
>
> Q. Were you clothed in your police uniform?
>
> A. Yes, sir.
>
> Q. Both of you?
>
> A. Yes.

Q. And he invited you in?

A. That's correct.

Q. And when you stepped inside the door, you saw the shotguns and rifles in plain view in the living room?

A. Yes, sir. (Tr. of T., p. 48, lines 21-25; p. 49, 1-8)"

The next day, September 3, 1977, Jim Covert, resident in charge of U. S. office of alcohol, tobacco and firearms in Paducah, together with his assistant, William Jurison, went to the Gordon home. Officer Covert testified as follows:

". . . As we arrived, Mr. Gordon was not immediately there. He arrived within a few minutes after we did, and I identified myself to him and agent Jurison, who was with me . . . he invited us in the house . . . as I walked in the house, I could observe several firearms in view on the wall; as I walked in . . . I could see them." (T. tr., p. 59, lines 5-25; p. 60, lines 3-8)

We quote from Bobby Gordon's testimony as follows:

"Q. Were you at home when they [Agents Jim Covert and Willian Jurison] came out to search your premises?

A. I wasn't at home at the time . . . the best I can remember, my wife and I had been fishing and we came up in the truck, pulling a fishing boat, and the officers, I believe Jurison and Covert, were there, I don't remember exactly what they said, but they did say something about my rights. I didn't know what they were talking about. There

was several people there at the time because we were just a little late getting in and I said, well, let's go into the house. Let's go into my living room and sit down and talk about it. So, we went into the living room and was talking about it, and he said that I had guns, that I wasn't allowed to have guns, and that he was going to take them in his possession, and I said, well, I know nothing about this. I said, let me, just let me call my lawyer and see what he thinks. So Mr. Covert said, well, either way it goes, we're going to take the guns . . . and I told Mr. Covert, I said, well, if you're going to take the guns, you're going to take them. I said, a search warrant wouldn't actually be necessary. You would just have to go back to town and get a warrant. It's not necessary. If you think I am in violation, and the guns is in violation, well take them." (T. tr., p. 109, lines 5-25 and p. 110, lines 1-6)

. . . . . .

"Q. . . . Mr. Gordon, what was the purpose of your having these guns?

A. Well, my boys, my wife and I have hunted together for years. The boys and I especially hunted together and when Linda and I was going together we hunted together with the boys, and after she and I became husband and wife we all hunted together. We hunted deer. We squirrel hunted. We duck hunted. We just enjoyed the sport of hunting.

Q. Are you telling this jury that that's the reason you had those guns?

A. That was the only reason I had the guns." (T. tr., p. 110, lines 10-22).

"Q. It's been testified here, I believe that they were in your gun case in your living room?

A. Yes, they were.

Q. Were they in plain view of anybody that came to visit you in your home?

A. They were in plain view.

Q. How many front entrances do you have to your home?

A. Just one.

Q. Is it not the one that goes into your living room?

A. It's the one that goes into the living room. And the gun cabinet set against the wall. It was a cabinet that my wife had given me and we had placed the guns in the gun cabinet.

Q. I'll ask you if as anybody entered the living room, if they could see these guns in plain view?

A. They were in plain view. They could very easily be seen by just merely opening the door or looking through the door.

Q. Was it glass?

A. There was glass.

Q. They wouldn't have to open the door?

A. They can look through the glass door.

Q. In other words, you were not trying to hide them?

A. No, I had no reason to hide them.

Q. Were those eight guns that is here that they have testified that they were in your home in your gun cabinet there, were they your guns?

A. Mr. Karnes, part of those guns were my guns and some of those guns were my boys guns and some were my wife's guns." (T. tr., p. 110, lines 22–25; p. 111, p. 1–25; p. 112, lines 1).

. . . . . .

"A. . . . I'll say that four of those guns were mine." (T. tr. p. 114, lines 4 & 5).

. . . . . .

"Q. . . . You are telling this jury that these four guns were yours?

A. Yes, sir.

Q. And they were in your living room along with these other family guns?

A. Yes, sir.

Q. And they were in your possession?

A. They were in my possession." (T. tr., p. 116, lines 6-13).

. . . . . .

"Q. . . . What was your purpose of having these guns?

A. Well, Mr. Karnes, the purpose of those guns was for sporting purposes. I have owned a hunting license for years. My son had a hunting license. My wife had a hunting license. We hunted together. We deer hunt. We squirrel hunt. We rabbit hunt. We duck hunt. We hunt groundhogs. To us, this is a recreation. We fish together. It's just, and we go to turkey shoots where they have turkey shoots and shoot the guns, you know, compete with other people with targets.

Q. Was that the only purpose that you had for these guns?

A. I had no other reason for them." (T. tr., p. 118, lines 15-25 and p. 119, lines 1 & 2).

. . . . . .

"Q. Were you using them in any way in any kind of interstate commerce?

A. Well, I wouldn't think so. The only thing I was using them for was just to hunt." (T. tr., p. 126, lines 1013).

On cross examination Bobby Gordon testified as follows:

"Q. Now, is your testimony, Mr. Gordon, that the only fi arms you have ever possessed or owned, have been for hunting purposes?

A. That's correct.

Q. And that the only firearms that you have ever owned or possessed have been rifles and shotguns?

A. That's right.

Q. Now, have you never owned a pistol?

A. No, sir. I never owned a pistol.

Q. You never did have a pistol?

A. I never owned a pistol." (T. tr., p. 136, line 25 and 137, lines 1-10).

. . . . . .

Q. Have you had target practice with them?

A. No.

Q. Shot them?

A. Not recently. I have shot a pistol.

Q. Haven't you shot target practice with Jimmy Williams?

A. No, sir, not with a pistol . . . (T. tr., p. 137 lines 19-21).

When we learned that the Federal officers had seized Bobby Eugene Gordon's guns, we immediately went to our law books. We found section 1202(a), (1), 18, App., U. S. Code, which provides as follows:

(a) Any person who—

(1) has been convicted . . . of a felony . . .

. . . . . .

(5) . . . and who receives, possesses, or transports *in commerce or affecting commerce,*

after the date of the enactment of this act, any firearm shall be fined not more than $10,000.00 or imprisoned for not more than two years, or both Emphasis ourt).

Commerce as used in this law means interstate or foreign commerce. 18 U.S.C.S. App. Sec. 1202(c).

We wondered how the United States would prove that these unloaded family hunting guns were in interstate commerce or affecting interstate commerce. Imagine our surprise when the indictment was returned and we saw it and learned that it was not even alleged that these guns were in commerce or affecting commerce. It was only alleged that they "had moved in interstate commerce."

We filed a motion to dismiss this indictment because it failed to allege any criminal offense. (Appellant's appendix filed in the U. S. Court of Appeals, page 3). In support of this motion we filed a brief citing the foregoing sections of the U. S. Code and also citing the case of U. S. v. Bass, 404 U. S. 336, 30 Law Edition 2nd 488, 92 SCT 511. (Appellant's appendix filed in U. S. Court of Appeals, p. 4-11).

The District Court overruled our motion to dismiss. (Appellant's appendix filed in U. S. Court of Appeals, p. 15), apparently relying upon Scarborough v. United States, 97 SCT 1963 (1977). We did not interpret the Scarborough opinion of this Court as sustaining the District Court's decision. Pursuant to our request by phone the Clerk of the U. S. District Court for the Eastern District of Virginia sent us a copy of the Scarborough indictment. It charges that "on or about

August 1, 1973 . . . Scarborough, having previously been convicted in 1972 of felonies . . . to-wit: possession of a controlled drug with intent to distribute, unlawfully and knowingly did . . . *possess in commerce and affecting commerce* four firearms, that is, [two revolvers and two rifles are described]."

"(Violation of Title 18, App., U. S. Code, Section 1202(a))" (Emphasis ours). The Scarborough indictment charged an offense. It charged that Scarborough possessed those firearms *in commerce and affecting commerce.* The Bobby Eugene Gordon indictment made no such allegation. We renewed our motion to dismiss the indictment (Appellant's appendix filed in the U. S. Court of Appeals, p. 16) and filed a brief in support thereof (Appellant's appendix, U. S. Court of Appeals, p. 17-22) and filed in support thereof a copy of the indictment in the Scarborough case. (Appellant's appendix in the U. S. Court of Appeals, p. 23). The District Court again overruled our motion to dismiss the indictment. (Appellant's appendix filed in U. S. Court of Appeals, p. 24).

As the District Court and the United States Court of Appeals seemed to rely so heavily on the Scarborough case, we think it appropriate to discuss it further here. The Scarborough indictment charged that Scarborough did possess "in commerce and affecting commerce four firearms, that is, [two pistols and two rifles are specifically described]." The Scarborough indictment specifically charges that Scarborough's possession was *"in commerce and affecting commerce."*

The difference in the statute which makes it a violation to possess a firearm in commerce or affecting commerce and the indictment charging Bobby Eugene Gordon with possession of these guns *"which had moved in interstate commerce"* is very material. In this case crucial. Those unloaded family hunting guns in plain view in the Gordon family living room were not in commerce or affecting commerce. It is not alleged that they were.

Not only is the Scarborough indictment materially different from the indictment in the base at bar, as hereinbefore discussed, the facts in the Scarborough case are very different from this case.

From the Scarborough opinion of the United States Court of Appeals 539 F. 2d 331 and of the Supreme Court 97 SCT 1963, L. Ed. 2d 582 and the footnotes of said opinions, we learn that in 1972 Scarborough pleaded guilty to the felony of possession of narcotics with intent to distribute, and that,

In 1973 a State investigator received information from an informant that Scarborough was selling illegal drugs from his home, that informant himself had purchased illegal drugs from Scarborough on numerous occasions during the "last six months." On July 16, 1973 the confidential informant and an undercover agent went to Scarborough's home where the undercover agent observed the confidential informant purchase $125.00 worth of LSD; the undercover agent had a conversation on the night of July 16, 1973 with Scarborough concerning other illegal drugs which Scarborough said he had in his possession, and

On August 1, 1973 Scarborough was arrested while he was leaving his house. He had on his person at the time 287 doses of LSD. In accordance with a valid search warrant, Scarborough's home was searched. A Colt Cobra 2 inch revolver was found in the drawer of a night stand near Scarborough's bed. The revolver was loaded. Two 30 caliber rifles were found hidden under the bed. Both of them were loaded. Another revolver was found in the house, and

The government proved that the two revolvers and the two rifles had previously moved in interstate commerce.

The jury found the Defendant guilty.

We say to this Court frankly that we think the jury verdict in the Scarborough case was justified. Scarborough was engaged in the business of selling illegal drugs. He was conducting this business from his home. In his home was a loaded revolver and two loaded rifles. Clearly these loaded guns were being used by him in furtherance of his illicit business of peddling drugs which no doubt had traveled in interstate commerce. We believe from these facts alone the jury would have been justified in finding that Scarborough's possession of these guns affected commerce. The traffic and use of drugs in the United States certainly affects commerce.

The statute does not state how much commerce must be affected. It was certainly not intended to require the United States to prove that the entire United States Commercial system be greatly affected by one person possessing a firearm. All that is required is that com-

merce is affected. Although the Trial Court and the Appellate Courts emphasized the fact that Scarborough's guns had traveled in interstate commerce, the fact that these firearms were hidden and that they were loaded and that Scarborough was illegally selling drugs from his home where these loaded firearms were hidden are all mentioned. We believe that had we been on the jury the fact that these hidden loaded firearms were in his home from which home he was conducting this illegal business of selling drugs which were bound to have passed in interstate commerce would have been more persuasive to us that these firearms were affecting commerce than the fact that they had, at some time in the past, been shipped in interstate commerce. There is a vast difference in the Scarborough case and in the Bobby Eugene Gordon case. In Scarborough there is no indication that these guns were being used for hunting or sporting purposes. Two of them were revolvers. In Scarborough, the indictment charges that Scarborough possessed these guns in commerce and effecting commerce. The indictment in the Bobby Eugene Gordon case does not charge that his possession was in commerce or affecting commerce. The indictment should have been dismissed.

This Case is Double Jeopardy. This Law as Interpreted and Applied to the Facts of This Case is an Ex Post Facto Law. For This Reason the Indictment Should Have Been Dismissed.

In the Scarborough case, Scarborough was convicted of a felony in 1972, four years after the Federal firearms law was passed. No question of double jeopardy or ex post facto was involved. In the present case the indictment charges that Bobby Eugene Gordon has been convicted of a felony in February of 1964, four years before the passage of this Federal law.

Article I, Section IX of our United States Constitution provides: "No . . . ex post facto law shall be passed."

Amendment V of the United States Constitution provides: ". . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Here Bobby Gordon, because he was convicted of a felony in 1964, is now being convicted of another offense which except for his 1964 conviction would not be an offense at all. To Bobby Gordon this is double jeopardy. We agree. If you were in Bobby Gordon's shoes, wouldn't you feel the same way?

In 1964 Bobby Eugene Gordon was convicted of a felony. He served his sentence. Thereafter the Federal government passed a law which as interpreted by the Trial Court and the United States Court of Appeals prevents him from possessing a hunting gun and inflicts upon him a punishment for possessing a hunting gun.

To Bobby Eugene Gordon this is an ex post facto law. Isn't he right?

Let's see how this works. We have another good friend, another fine fellow, Dr. John Wood, pastor of First Baptist Church in Paducah who likes to hunt. He has taken at least one hunting trip to Africa and one or more hunting trips to South America besides hunting locally. We are confident that Dr. Wood keeps hunting guns in his possession in his home. Now if he had lived in another era, say in the time of the Apostle Paul, it would probably be Dr. Wood who would have the prison record. But in this case it is Bobby Eugene Gordon. The only difference in what Dr. Wood is doing and what Bobby Eugene Gordon was doing is that in February of 1964, four years before this law was passed, Bobby Eugene Gordon was convicted of a felony. In the District Court we moved to dismiss the indictment because to permit a prosecution thereunder would constitute double jeopardy and that the law alleged to have been violated as applied to the facts alleged is an ex post facto law. (Appellant's appendix filed in the U.S. Court of Appeals, p. 25). The District Court erred in not sustaining our motion. The United States Court of Appeals erred in not reversing.

The Indictment Should Have Been Dismissed Because the Honorable Julian Carroll, Governor of the Commonwealth of Ky., Had Issued and Delivered to Bobby Eugene Gordon a Pardon Restoring to Him "ALL RIGHTS OF CITIZENSHIP."

Another grounds for dismissing the indictment was that the Governor of Kentucky on November 29, 1977 had signed and delivered to Bobby Eugene Gordon a pardon granting unto him "ALL THE RIGHTS OF CITIZENSHIP." (Appellant's appendix in the United States Court of Appeals, p. 25-27).

It is our position that the foregoing instrument signed by the Governor of Kentucky is a full pardon. We understand it is the standard pardon granted by the Governor to all convicted felons whom he wishes to pardon. When the Court of Appeals for the Fifth Circuit was faced with this question in U.S.A. v. Matassini, 565 Federal 2d 1297, that Court analyzed its problems as follows:

> But as we shall discuss, the state pardon granted to Matassini did contemplate the removal of virtually all collateral disabilities flowing from Matassini's 1950 conviction. In particular, the pardon both contemplated and had the effect, under state law, of restoring to Matassini the right to receive and possess firearms. We must determine whether this pardon is sufficiently "express" to bring Matassini within the § 1203(2) exemption. We do so in light of the effect that the pardon was intended to have under Florida law, the language and legislative history of Title VII, and the applicable canons of statutory construction. We come to the following conclusions:
>
> (1) That Matassini's Florida pardon was premised on an assessment of Matassini as an individual and was intended to restore to him full and complete civil rights, specifically including the right to receive and possess a firearm;
>
> (2) That Congress, in requiring express authorization for convicted felons to receive and possess firearms, intended that pardoning authorities consider the effect on public safety of permitting any given pardonee to receive and possess firearms;
>
> (3) That where this legislative purpose is satisfied, Congress did not intend the absurd requirement that talismanic words be employed prior to the time those words were specified; and
>
> (4) That the 1955 pardon granted to Matassini satisfied the federal legislative purpose, came as close to "express authorization" as was reasonably possible under the circumstances, and thus satisfied the requirements of § 1203(2).

We submit that the pardon granted by the Governor of Kentucky satisfied the federal legislative purpose in that it restored to Bobby Eugene Gordon "ALL RIGHTS OF CITIZENSHIP" and thus satisfied the requirements of 18 U.S.C. 1203(2).

Kentucky, like Florida, has a statute prohibiting the possession of a firearm by a convicted felon. KRS 527.040 provides as follows:

> Possession of handgun by convicted felon—Exceptions.—(1) a person is guilty of possession of a handgun by a convicted felon when he possesses,

manufactures, or transports a hand gun when he has been convicted of a felony, as defined by the laws of the jurisdiction in which he was convicted in any state or federal court and has not:

(a) Been granted a full pardon by the governor or by the president of the United States; or

(b) Been granted relief by the United States secretary of the treasury pursuant to the Federal Gun Control Act of 1968, as amended.

(2) Possession of a handgun by a convicted felon is a Class D felony.

(3) The provisions of this section shall apply only to persons convicted after January 1, 1975. Enact. Acts 1974, ch. 406, § 237.

There would be no contention in Kentucky but what the pardon granted to the Petitioner herein would be sufficient to preclude his conviction under the above statute.

This question has not been presented to the Supreme Court of the United States; however, in Barrett v. United States, 423 U. S. 212, 46 Law edition 450 at footnote 3, page 215, it reads as follows:

> 3. The defense also moved to quash the indictment on the ground that on June 20, 1969, the Governor of Kentucky, by executive order in the nature of a pardon, had granted petitioner "all the rights of citizenship denied him in consequence of said judgment of conviction." It was suggested that this served to wipe out petitioner's state felony conviction of January, 1967. The motion to quash was denied. The same argument was made in the Court of Appeals, but that court unanimously rejected it

> for reasons stated in the court's respective majority and dissenting opinions. 504 F. 2d 629, 632-634 (CA6 1974). The issue is not presented here.

From the foregoing it is obvious that the court in the Metassini case went further into the question involved relative to pardon than has any other court, and in doing so, effectively ruled that a state pardon should be assessed upon an individual basis; and if it is intended to restore full civil rights and would negate a state statute prohibiting the possession of firearms, that would also have the same effect when applied to 18 USC 1202(a)(1).

The District Court Erred in Informing the Jury That One Who Has Been Convicted of a Felony is Prohibited By Federal Law From Possessing a Gun.

Immediately after the jury panel was sworn, the Court told them that in the indictment it is alleged that Defendant had in his possession firearms after he had allegedly been convicted of a felony, *"which is a felony under the pertinent sections of the United States Code."* (T. tr., p. 5, lines 19 & 20).

. . . . . .

> ". . . *The law says that a person convicted of a felony cannot possess a firearm.* . . . Are there any of you who have any feelings against the law which prevents a man convicted of a felony from possessing a weapon or a firearm?" Emphasis ours) (T. tr., p. 11, lines 9-14).

The Court made no mention of the fact that the violation was for such a person to possess a firearm in commerce or affecting commerce.

The United States had probably precipitated the foregoing error in that the United States had tendered to the Court a set of instructions one of which was as follows:

> *"The mere possession of a firearm by one who has been convicted of a felony is a violation of the laws of the United States."* (Emphasis ours) (Court of Appeals appendix, p. 32).

In the above, the United States misstates the law. The law provides that "any person who has been convicted . . . of a felony . . . and who . . . possesses . . . *in commerce or affecting commerce* . . . any firearm" shall be fined and/or imprisoned.

In the indictment the United States warps the meaning of the statute by omitting the words *"in commerce or affecting commerce"* and in substituting therefor the words *"had moved in interstate commerce."* In the foregoing quoted statement of the Court which the Court made to the jury at the very beginning of the trial, the Court in effect deleted *"in commerce or affecting commerce."*

It is morally wrong for the United States to warp a statute by changing the wording or by omitting words in order to convict an innocent man. As was done in this case. It is wrong for the United States to warp or delete from a statute in order to convict any person,

The District Court Committed Reversible Error In That Before Imposing Sentence, the Court Did Not Address Defendant Personally and Ask Him If He Wished To Make a Statement In His Own Defense and Present Information in Mitigation of Punishment. The United States Court of Appeals Erred In Not Reversing the District Court.

We quote Rule 32(a) Federal Rules of Criminal Procedure promulgated by this Court as follows:

RULE 32. SENTENCE AND JUDGMENT.

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. *Before imposing sentence the Court* shall afford counsel an opportunity to speak on behalf of the Defendant *and shall address the Defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.* The attorney for the Government shall have an equivalent opportunity to speak to the Court." (Emphasis ours).

The Court did not address the Defendant personally and ask him if he wished to make a statement in his own behalf or present any information in mitigation of punishment. (Appellant's appendix filed in U. S. Court of Appeals, p. 49-57). The District Court clearly failed to comply with the foregoing rule of this Court. In failing to comply with the foregoing rule the District Court committed reversible error. The foregoing rule is important. Else it would not have been promulgated

by this Court. The District Court committed reversible error in not following the foregoing rule. The United States Court of Appeals erred in not reversing the District Court.

REASONS FOR GRANTING WRIT

This Court should grant the writ of certiorari in this case for the following reasons:

1. Bobby Eugene Gordon, an American Citizen, is being returned to prison when he has committed no wrong and has violated no law.

2. Section 1202(a) Title 18, Appendix U. S. Code as interpreted and applied in this case is an ex post facto law and constitutes double jeopardy. (Article I, Section IV, U. S. Constitution, and Amendment V of U. S. Constitution).

3. The District Court and the United States Court of Appeals failed to give effect to a pardon issued by the Governor of Kentucky restoring to Bobby Eugene Gordon "ALL RIGHTS OF CITIZENSHIP." This was in violation of 18 USCA, Appendix 1203(2).

4. The District Court erred in informing the jury that one who has been convicted of a felony is prohibited by Federal law from possessing a gun. This statement was in serious error. Federal law does not prohibit one who has been convicted of a felony for possessing a gun. It prohibits such a person from possessing a gun in commerce or affecting commerce.

5. The District Court committed reversible error in that before imposing sentence the Court did not address Defendant personally and ask him if he wished to make a statement in his own defense and present information in mitigation of punishment. This was in clear violation of Rule 32(a), Federal Rules of Criminal Procedure promulgated by this Court.

CONCLUSION

For the reasons hereinbefore set out we respectfully urge that a writ of certiorari should issue to review the judgment and opinion of the sixth circuit.

Respectfully submitted,

JOSEPH S. FREELAND
621 Washington Street
Paducah, Ky. 42001

ALBERT KARNES
1020-21 Citizens Bank Bldg.
Paducah, Ky. 42001

Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-5236

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

BOBBY EUGENE GORDON - - *Defendant-Appellant*

ORDER—Filed January 8, 1979

Before: CELEBREZZE, LIVELY and KEITH, Circuit Judges.

Upon being invited into appellant's home on September 2, 1977, two uniformed policemen observed several shotguns and rifles in a gun case in appellant's living room. The next day, two agents from the Federal Bureau of Alcohol, Tobacco and Firearms went to appellant's home and observed these same guns. As appellant had been convicted of a felony in 1964, he was subsequently indicted and convicted on two counts of possessing a firearm in violation of 18 U.S.C. App. § 1202(a).

Upon due consideration of the record on appeal, the briefs and oral arguments of counsel for the parties, and being fully advised in the premises, this Court is of the opinion that appellant's contentions that 1) the indictment failed to allege an offense under the statute, 2) § 1202(a) operates as an *ex post facto* law as applied to him and prosecution thereunder constitutes double jeopardy, 3) a gubernatorial pardon in regard to his 1964 felony conviction removed him from the ambit of the statute and, 4) the trial court committed reversible error in instructing the jury are without merit.

It is therefore ORDERED that appellant's conviction be, and the same hereby is, affirmed.

Entered By Order of The Court
(s) John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-5236

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

BOBBY EUGENE GORDON - - *Defendant-Appellant*

ORDER—Filed April 3, 1979

Upon consideration of Defendant-Appellant's Petition for Rehearing in the above-captioned cause and being fully advised in the premises, the Court is of the opinion that the issues raised herein were adequately considered and finally resolved when this matter first came on for a hearing.

Therefore, it is ORDERED that Defendant-Appellant's Petition for Rehearing be, and the same hereby is, denied.

Entered By Order of The Court
(s) John P. Hehman, Clerk

HEARING FOR PURPOSE OF SENTENCING

Paducah, Kentucky
May 18, 1978 — 8:46 A.M.

PROCEEDINGS

The Court: Call the next case.

Clerk of Court: Your Honor, call CR-78-00024-P, United States versus Bobby Eugene Gordon, for purpose of sentencing.

Mr. Jones: If the Court please, we have some witnesses here, a policeman from Murray, Kentucky, and parents of Lawson, and a young man from Murray, and rather than having them sit through all the proceedings, could you excuse them so they could leave the courtroom?

The Court: They are excused. The Probation Report contains certain things, the prior record of this man. Mr. Karnes, is the prior record as revealed by the Probation Report correct?

Mr. Karnes: As far as we know it is correct. If the Court please, we filed two days ago and mailed to Your Honor a copy, you have the original there.

The Court: Do you want to be heard, Mr. Jones.

Mr. Jones: Beg pardon?

The Court: Do you want to be heard?

Mr. Jones: Other than, do you mean about our recommendation?

The Court: Yes, sir.

Mr. Jones: Yes, sir.

The Court: What is your recommendation? This is the case where the jury in this Court found the Defendant not guilty on how many of the five counts?

Mr. Jones: He was only found guilty of two counts.

The Court: An those two counts were for knowingly possessing.

Mr. Jones: Knowingly possessing a .303 caliber rifle

and a .30/.30 caliber pump action rifle, and a number of other rifles. I believe that's right.

The Court: No, only two were involved. Yes, you are right.

Mr. Jones: A 12-gauge bolt action shotgun, an Italian gun of some kind, a Mossberg.

The Court: Yes. What is your recommendation.

Mr. Jones: All-right, the United States will recommend the sentence of two years confinement in the penitentiary.

The Court: What would it have been on seven counts?

Mr. Jones: Well . . .

The Court: The same?

Mr. Jones: No. Do you mean after trial?

The Court: Yes.

Mr. Jones: No, it would not have been the same, no.

The Court: What is your recommendation?

Mr. Karnes: If the Court please, Bobby Eugene Gordon testified that four of these guns were his. Of course under joint possession the jury could very well have found him guilty of possession of all of them, but he picked out four and he stated that the rest of them either belonged to his wife or to his sons, so I just wanted to call that to the Court's attention. I don't believe there was any evidence to conflict with that. The Court has heard the evidence, has seen the Defendant here, as did the jury. I do not have much to add to what I stated in my present brief. I would like to call the Court's attention to the fact that he is here by employed attorney. I say to the Court that my fee for representing him in this matter was thirty-five hundred dollars. He gave a mortgage on his property and a note. I just want the Court to realize that when the Court fixes the amount of the fine. There is no evidence that these guns were being used in any manner, any illegal manner, except the mere possession of them. The law gives this Court discretion. It is in the hands of this Court, and we have nothing that we could add that we know of.

The Court: The Court has given considerable thought to the sentence which should properly be imposed on Mr. Gordon. The Court is aware of the fact that most of Mr. Gordon's trouble has been connected with misdemeanors. The Court knows that a lot of it is connected with alcoholic beverages. The Court is aware of the fact that there is a law by Congress which prohibits a felon from being in possession of firearms. The Court is concerned that so much of the time in the Federal Court is taken up with these matters which probably should be handled at a State level. I understand the Attorney General of the United States has issued a policy statement down through the proper authorities wherein this type of prosecution will probably not be so frequent so that the terms of the Speedy Trial Act on more serious crimes can be complied with. The Court notes that in this District there have been many of these suits or many of these cases and takes judicial knowledge of the fact that there are many felons from many years back, who have in their possession guns and who actually do not know they are violating the law. In this case the guns were in plain open view of anybody who went in the front door of the home. No attempt whatsoever to hide the guns, so maybe this is a back-handed way for somebody to get somebody else off the street. The Court notes that there is a picture in the elevator saying, Don't shoot eagles, but would recommend to the United States or the proper authorities, certainly if we are going to enforce gun control laws they ought to get a program of public education going in Western Kentucky. The law is being violated right and left, to-wit: go to the local dove shoots in the rural counties of this area and check the fellows who many years ago might have been convicted bootleggers. Notwithstanding that, the Congress has passed a law, and when they pass a law it is up to the courts to enforce that law. The Court has considered this matter and finds that a jury in the community convicted

this man. It is therefore the judgment of this Court that the Defendant is committed to the custody of the Attorney General for a period of one year and one day on each of the Counts, Counts I and II, of the Indictment CR-78-00024-P. Said sentences are to run concurrently, each with the other, for a total sentence of one year and one day. The sentence shall be served under the provisions of Title 18 of the United States Code, Section 4205 (b) (2). That concludes this matter.

Mr. Karnes: What is that section, if the Court please? Title 18, Section what?

The Court: 4205 (b) (2).

(Whereupon the proceedings in this case were concluded at 8:58 A.M. on May 18, 1978.)

United States District Court
Western District of Kentucky
At Paducah:

I, James A. Joplin, Office Court Reporter for the above named Court do hereby certify that I reported the proceedings in the above action at the time and place as set forth above, and that I transcribed from my stenographic notes said proceedings into the foregoing six (6) pages, which constitute a full, true and accurate transcript of said proceedings.

This the 26th day of July, 1978.

(s) James A. Joplin
Official Court Reporter
2807 Broadway
Paducah, Kentucky 42001
443-9309

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT PADUCAH

Docket No: CR-78-00024-01-P

Defendant:

BOBBY EUGENE GORDON } Docket No: CR-78-0024-01-P

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, Mr. Albert Jones the defendant appeared in person on this date —5-18-78

With Counsel: Mr. Albert Karnes, employed
Plea: Not Guilty

There being verdict of GUILTY, as to cts. 1 and 2 by a jury on 5-4-78.

Defendant has been convicted as charged of the offense of felon in possession of firearms in violation of Title 18, United States Code, Section 1202(a)(1) as charged in counts one and two of the indictment herein.

THE PRESENTENCE REPORT WAS FURNISHED BY THE PROBATION OFFICE AND READ BY THE COURT.

ONE YEAR AND ONE DAY as to each of counts one and two. Said sentences shall be served concurrently, each with the other, for a TOTAL sentence of ONE YEAR AND ONE DAY.

IT IS FURTHER ORDERED that the sentence imposed herein be pursuant to the provisions of Title 18, United States Code, Section 4205(b)(2) in that the defendant

shall be eligible for parole at the discretion of the U.S. Parole Commission.

IT IS FURTHER ORDERED that the defendant shall be permitted to participate in the Voluntary Surrender Program. He shall report to the institution designated for service of sentence in not less than forty nor more than forty-five days from this date.

Signed by:
(s) E. H. Johnstone
U. S. District Judge
Date: May 18, 1978

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

No. CR-78-00024-P

UNITED STATES OF AMERICA - - - - *Plaintiff*

v.

BOBBY EUGENE GORDON - - - - *Defendant*

MOTION

Defendant moves that the sentence herein be set aside and that the Court substitute in lieu thereof a reasonable fine and Defendant requests a hearing of evidence on this Motion, that he be permitted to testify and introduce proof on this Motion. He moves that a hearing on this Motion be set for a time certain.

Defendant says that at his sentencing he had some things on his mind that he wanted to say, but was never specifically given an opportunity to say them.

(s) Albert Karnes
1020-21 Citizens Bank Bldg.
Paducah, Ky. 42001
Attorney for Defendant,
Bobby Eugene Gordon

Copy furnished to the office of United States Attorney on this the 22nd day of May, 1978.

(s) Albert Karnes

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Criminal Action No. CR-78-00024-01-P

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

BOBBY EUGENE GORDON - - *Defendant-Appellant*

ORDER

The Defendant, Bobby Eugene Gordon, having filed certain motions, and the Court being sufficiently advised, IT IS ORDERED:

(1) The Motion to Set Aside and Substitute In Lieu Thereof a Reasonable Fine is OVERRULED:

(2) The Defendant has previously made an Appearance Bond of $2,000 with a 10% deposit with the Clerk of this Court. Said bond is hereby converted to an Appeal Bond.

Dated: June r, 1978

(s) Edward H. Johnstone
United States District Judge

Copies to:
U. S. Attorney
U. S. Probation-Paducah
Mr. Albert Karnes, counsel

Supreme Court, U. S.
FILED
JUN 28 1979
MICHAEL RODAK, JR., CLERK

No. 78-1658

In the Supreme Court of the United States

OCTOBER TERM, 1978

BOBBY EUGENE GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
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Attorneys
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1658

BOBBY EUGENE GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 27) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1979. A petition for rehearing was denied on April 3, 1979 (Pet. App. 28). The petition for a writ of certiorari was filed on May 1,

1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, a convicted felon who possessed firearms, was exempt from prosecution under 18 U.S.C. App. 1202(a) because he received a pardon for the predicate felony after his arrest on the firearms charges.

2. Whether 18 U.S.C. App. 1202(a), as applied to petitioner, is an ex post facto law or one that subjects him to double jeopardy.

3. Whether an indictment charging that petitioner, while a convicted felon, possessed firearms "which had moved in interstate commerce" states an offense under 18 U.S.C. App. 1202(a).

4. Whether the procedure followed by the district court at sentencing denied petitioner the right of allocution guaranteed by Fed. R. Crim. P. 32(a).

5. Whether the district court's incomplete paraphrase of the indictment at the beginning of trial was reversible error where the jury instructions given at the close of the trial were proper.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner, a convicted felon, was convicted on two counts of unlawfully possessing firearms, in violation of 18 U.S.C. App. 1202(1). He was sentenced to

concurrent terms of imprisonment for one year and one day, subject to the immediate parole eligibility provisions of 18 U.S.C. 4205(b)(2). The court of appeals affirmed (Pet. App. 27).

The facts are not in dispute. Petitioner was convicted on February 11, 1964, in McCracken County Circuit Court, Paducah, Kentucky, of receiving stolen property, and he served 27 months of a three-year sentence (Tr. 25-26, 104). In the year following petitioner's release from prison, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 (hereafter "the Omnibus Act"), which made it a federal crime for a convicted felon knowingly to possess a firearm [1] but exempted those felons who had received pardons that specifically authorized them to carry firearms.[2]

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[1] 18 U.S.C. App. 1202(a)(1) provides:

> (a) Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony,
>
> * * * * *
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

[2] 18 U.S.C. App. 1203 provides in pertinent part:

> This title shall not apply to—
>
> * * * * *
>
> (2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President

On September 2, 1977, two uniformed police officers entered petitioner's home with his consent and observed a gun cabinet containing firearms, all of which were in plain view (Tr. 42-49). The officers notified the Bureau of Alcohol, Tobacco, and Firearms, and the following day two ATF agents went to petitioner's residence, saw the guns, and placed him under arrest (Tr. 57-62). Petitioner admitted that all but two of the ten guns found in his home at the time of his arrest belonged to him (Tr. 63-64, 68). At trial he admitted that four of the guns were his (Tr. 114), asserting that the others belonged to members of his family. Petitioner's defense was that he used the guns only for hunting or other recreational purposes.

After his arrest for violating 18 U.S.C. App. 1202, petitioner applied for a pardon for the underlying state felony (Tr. 104-105). On November 29, 1977, the Governor of Kentucky granted him a partial pardon, restoring his citizenship rights but not containing any express authorization for petitioner to receive, transport, or possess firearms (A. 26-27).[3]

On March 4, 1978, petitioner was indicted by a federal grand jury on two counts of possession and one count of receiving stolen firearms. He was convicted on the possession counts.

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or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

[3] "A." refers to petitioner's appendix in the court of appeals.

ARGUMENT

1. Petitioner contends (Pet. 18-21) that the indictment charging him with federal firearms violations, predicated on his 1964 state felony conviction, should have been dismissed because he received a state pardon for the predicate offense after he was arrested for unlawful possession of the firearms. This contention has no support in law or logic. At the time he possessed the firearms in question, petitioner was an unpardoned convicted felon. He was therefore within the express terms of 18 U.S.C. App. 1202(a), was entitled to no exemption under 18 U.S.C. App. 1203, and was lawfully prosecuted for the offense regardless of subsequent events. See *United States* v. *Herrell*, 588 F.2d 711, 712-713 (9th Cir. 1978); *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978); *United States* v. *Williams*, 484 F.2d 428, 430 (8th Cir. 1973).[4] We do not concede that the pardon petitioner later received would have allowed him to possess the firearms even if he

---

[4] Petitioner makes no claim that the underlying conviction was unconstitutional, so this case does not raise the question presented in *Lewis* v. *United States*, cert. granted, No. 78-1595 (June 18, 1979). The circumstances here are also unlike those in *United States* v. *Fryer*, 545 F.2d 11, 14 (6th Cir. 1976), in which the court held that "a conviction *already set aside* under the Youth Corrections Act cannot constitute a conviction for the purpose of 18 U.S.C. App. § 1202(a) * * *" (emphasis supplied). (In *Fryer* the conviction had been vacated in 1973, although, owing to a clerical error, an official record had not been made at that time to show the judgment vacated. The firearms purchase with which the defendant was charged occurred in 1974.)

had received it before he undertook to possess them.[5] But the Court need not reach that question here, since petitioner unquestionably possessed the firearms before he received the pardon.

2. Petitioner also contends (Pet. 16-17) that 18 U.S.C. App. 1202(a) is an ex post facto law as applied to him, because he was convicted of the state felony before the federal law was enacted. In a related contention, he asserts that Section 1202(a) subjects him to double jeopardy because it punishes him a second time for the state felony. These arguments take no account of the fact that it was possessing firearms as a convicted felon, not simply being a convicted felon, that subjected petitioner to prosecution under Section 1202(a) and that he could have avoided prosecution by not undertaking to possess firearms. Petitioner cites no authority in support of his contentions, and similar arguments have been rejected by every circuit that has considered them. See, *e.g.*, *United States* v. *Sutton*, 521 F.2d 1385, 1390-1391 (7th Cir. 1975); *United States* v. *McCreary*, 455 F.2d 647, 648 (6th Cir. 1972); *United States* v. *Karnes*, 437 F.2d 284, 289-290 (9th Cir.), cert. denied, 402 U.S. 1008 (1971); *United States* v. *Phillips*, 432 F.2d 973, 975 (8th Cir. 1970). See also *Scarborough* v. *United States*, 431 U.S. 563 (1977); *Carlesi* v. *New York*, 233 U.S. 51 (1914); *Hawker* v. *New York*, 170 U.S. 189 (1898).

3. Petitioner argues (Pet. 10-15) that the indictment failed to allege a criminal offense because it charged him with possession of weapons "which had moved in interstate commerce" instead of merely tracking the statutory language by alleging that he possessed the firearms "in commerce and affecting commerce." An indictment will not be found defective for failure to use language identical to that of the statute in question, so long as it can reasonably be read to state the elements of the offense charged. See, *e.g.*, *United States* v. *Camp*, 541 F.2d 737, 739-740 (8th Cir. 1976); *United States* v. *Willis*, 515 F.2d 798, 799 (7th Cir. 1975); *Humphries* v. *Green*, 397 F.2d 67, 69 (6th Cir. 1968). See also *Hagner* v. *United States*, 285 U.S. 427, 431 (1932). Petitioner's contention that the language used in his indictment did not adequately state the commerce element of the offense is disposed of by this Court's decision in *Scarborough* v. *United States*, *supra*, 431

[5] Under 18 U.S.C. App. 1203, only a pardon that "expressly" authorizes its recipient to receive, possess, or transport firearms will exempt him from prosecution under 18 U.S.C. App. 1202. Petitioner's pardon does not refer expressly to rights with respect to firearms but merely restores "all rights of citizenship." This does not meet the requirements of Section 1203. *United States* v. *Sutton*, 521 F.2d 1385, 1389 (7th Cir. 1975). See also *United States* v. *Kelly*, 519 F.2d 794 (8th Cir.), cert. denied, 423 U.S. 926 (1975). In *United States* v. *Matassini*, 565 F.2d 1297 (5th Cir. 1978), the Fifth Circuit held that a Florida pardon granted in 1955 without an express reference to rights with respect to firearms was nevertheless sufficient to bring the recipient of the pardon within the Section 1203 exemption; but the court distinguished the case from those, like the present case, that involved pardons granted after passage of the Omnibus Act, when governors would be on notice of the language required in a pardon to restore the recipient's right to possess firearms. *Id.* at 1305 n.14.

U.S. at 575, holding that the term "affecting commerce" in 18 U.S.C. App. 1202 signifies nothing more than "the minimal nexus that the firearm have been, at some time, in interstate commerce." An indictment alleging that the defendant possessed firearms that had "moved in interstate commerce" thus states an offense under Section 1202(a).

4. Petitioner contends (Pet. 23-24) that he was denied the right of allocution guaranteed by Fed. R. Crim. P. 32(a) when the trial judge imposed sentence without having specifically asked petitioner if he wished to supplement his counsel's statement in mitigation of punishment.

This question was not properly raised below, however, and there is no reason for this Court to depart from its usual practice of declining to consider issues presented here for the first time. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).[6] This is not a case in which "the defendant was affirmatively denied an opportunity to speak during the

[6] The issue was not raised in petitioner's brief, his reply brief, or his timely petition for rehearing in the court of appeals. Although it was referred to briefly in a "Supplemental Petition for Rehearing" filed more than two weeks after the court of appeals' judgment, petitioner never sought an extension of time to permit the filing of this supplemental petition outside of the time allowed by Fed. R. App. P. 40(a). Moreover, the court of appeals' order denying rehearing, which states that "the issues raised herein were adequately considered and finally resolved when this matter first came on for a hearing" (Pet. App. 28), indicates that the court did not consider petitioner's belated claim. Hence, this issue was never properly presented to the court of appeals.

hearing at which his sentence was imposed" nor one in which it is suggested that the sentencing judge was "misinformed or uninformed as to any relevant circumstances" (*Hill* v. *United States*, 368 U.S. 424, 429 (1962)). Thus, although the district court may have erred in failing to comply strictly with Rule 32(a),[7] the error is not of sufficient magnitude to warrant this Court's review, especially since it was not properly raised in the court of appeals. Cf. *Hill* v. *United States*, *supra* (similar Rule 32(a) violation held not subject to collateral attack in the absence of a showing of prejudice).

Petitioner does not identify what information he would have brought to the district court's attention that his counsel failed to include in his presentation at sentencing, nor does petitioner otherwise allege prejudice.[8] Indeed, after hearing the remarks of defense counsel, the trial judge indicated that he was

[7] See *Green* v. *United States*, 365 U.S. 301 (1961); *United States* v. *Murphy*, 530 F.2d 1 (4th Cir. 1976); *United States* v. *Van Drunen*, 501 F.2d 1393, 1399 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). But cf. *United States* v. *Cardall*, 550 F. 604, 607 (10th Cir. 1976); *United States* v. *Scallion*, 533 F.2d 903, 920 n.20 (5th Cir. 1976), cert. denicd, 429 U.S. 1079 (1977).

[8] Petitioner filed the equivalent of a motion for reduction of sentence under Fed. R. Crim. P. 35 shortly after sentencing (Pet. App. 35), stating that he had "some things" he had "wanted to say" but not indicating what they were. He sought a hearing on his motion and replacement of the sentence of imprisonment by a fine (*ibid.*). The district court denied the motion (Pet. App. 36). Petitioner is free, however, to renew his motion and state specifically what facts he wishes to bring to the district court's attention.

extremely sympathetic to the mitigating circumstances in petitioner's case (Pet. App. 31), a viewpoint apparently reflected in the sentence. Under these circumstances, there is no reason to remand this case for resentencing.

5. Finally, petitioner contends (Pet. 21-22) that the district court improperly omitted a phrase from the indictment when paraphrasing portions of it for the jury at the start of the trial. Petitioner cites no authority for the proposition that this is reversible error even if the judge correctly instructs the jury, at the close of the case, on the elements of the offenses charged. Petitioner does not claim that the instructions given in this case were in any way inaccurate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 296089 17

Supreme Court, U. S.
FILED
AUG 1 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

No. 78-1658

BOBBY EUGENE GORDON - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES

No. 78-1658

BOBBY EUGENE GORDON - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES

May It Please This Honorable Court:

In Respondent's brief they state,

"The facts are not in dispute."

The above is true.

In Respondent's brief it is stated:

> "Petitioner's defense was that he used the guns only for hunting or recreational purposes."

Actually Petitioner's defense was that these unloaded family hunting guns in plain view in his family living room used only for hunting and recreational purposes were not "in commerce or affecting commerce."

The indictment does not allege that they were.

The proof does not show that they were.

For authority that the indictment and proof are sufficient, Respondent cites Scarborough v. United States, 431 U. S. 563, but Respondent does not discuss either the Scarborough indictment or the Scarborough proof.

Why?

Why does Respondent not discuss the Scarborough indictment? Respondent does not tell this Court that the Scarborough indictment charges that "on or about August 1, 1973 . . . Scarborough, having previously been convicted in 1972 of felonies . . . to-wit: possession of a controlled drug with intent to distribute, unlawfully and knowingly did . . . possess *in commerce and affecting commerce* four firearms, that is, [2 revolvers and 2 rifles are described]." (Emphasis ours.) (Appellant's Appendix, U.S. Court of Appeals, p. 23).

Respondent does not discuss the facts of the Scarborough case. Respondent does not tell this Court that Scarborough was engaged in the business of unlawfully trafficking in drugs, that he was conducting his business from his home where he had concealed two pistols and two rifles. They were loaded. Respondent does not tell this Court that in Scarborough there appears to have been no proof that these guns were used for sporting or recreational purposes. Two of them were handguns. Pistols. They were loaded.

The United States position at the trial was that "the mere possession of a firearm by one who has been convicted of a felony is a violation of the laws of the United States" (Court of Appeals, Appendix, p. 32).

The District Court agreed and told the jury at the very beginning of the trial that a person who has been convicted of a felony cannot possess a firearm and that possession of a firearm by one who has been convicted of a felony is a felony under the pertinent sections of the United States Code (Tr.,p. 11, lines 9-14, and Tr., p. 5, lines 19 and 20).

Although the final instructions to the jury were not quite as positive, the Court never rescinded the foregoing statements made to the jury at the very beginning of the trial. In fact from what the Court said at the very beginning of the trial and all the way through the trial it was clear that the Court was of opinion that a person who has been convicted of a felony is prohibited by Federal law from possessing a hunting gun. In sentencing Petitioner the Court said "the Court is aware of the fact that there is a law by Congress which prohibits a felon from being in possession of a firearm" (Court of Appeals, Appendix, p. 53).

We quote the above to emphasize that from the beginning and all the way through, the Court gave no favorable consideration to our position that in order for Petitioner to be guilty it must be alleged and proven that his possession of those guns was in commerce or affecting commerce. That those unloaded hunting guns in plain view in Petitioner's family living room were not in commerce or affecting commerce was our defense.

In Respondent's brief they say that Petitioner cites no authority for his position that the law as interpreted by the District Court and the Court of Appeals is an ex post facto law and that prosecuting Petitioner

as was done in this case constitutes double jeopardy. Respondent is in error. We cite and quote from the United States Constitution.

However, there is no need to question the constitutionality of this law. Petitioner has not violated this law. His possession of these guns was not in commerce or affecting commerce.

Ordinarily hunting guns are not considered as arms, therefore they are not firearms. We quote from Webster's New International Dictionary, 2nd edition, as follows:

> "*Arms* 1. Instrument or weapons of offense or defense; loosely, objects of any kind that may be used as weapons."

It is plain from the above that generally hunting guns used only for hunting or recreational purposes are not considered arms, however, sometimes they are loosely referred to as such.

It is true the Title VII says that the law applies to a shotgun or a rifle. Title IV provides as follows:

> "(3) The term 'firearm' means (A) any weapon . . . or (D) any destructive device . . .
>
> (4) The term 'destructive device' means—
>
> (b) Any type of weapon (other than a shotgun . . .) . . .
>
> the term 'destructive device' shall not include . . . a rifle which the owner intends to use solely for sporting, recreational or cultural purposes."

Construing Title IV and Title VII together so as to give effect to both of them, a fair interpretation is that

this omnibus law applies to shotguns and rifles unless they are intended to be used and are used solely for "sporting, recreational or cultural purposes."

Now Title IV and Title VII are all part of the same law passed by Congress at the same time. We quote from Title IV as follows:

> "Sec. 901.(a) The Congress hereby finds and declares:
>
> . . .
>
> (2) That the ease with which any person can acquire firearms *other than a rifle or a shotgun* (including criminals), is a significant factor in the prevalence of lawlessness and violent crime in the United States;
>
> (3) That only through adequate control over interstate and foreign commerce of these weapons, . . . can this grave problem be properly dealt with, . . .
>
> (4) That the acquisition on a mail order basis of firearms *other than a rifle or a shotgun* by . . . individuals, from a place other than their state of residence, has materially tended to thwart the effectiveness of state laws and regulations . . .
>
> (5) That the sale or other disposition of *concealable* weapons . . . has tended to make ineffective laws, . . . in the several states and local jurisdictions regarding such firearms;
>
> (6) That there is a causal relationship between the easy availability of firearms *other than a rifle or a shotgun,* and . . . criminal behavior . . .
>
> (7) That the United States has become the dumping ground of the castoff surplus military

weapons of other nations, and that such weapons and the large volume of relatively inexpensive *pisols and revolvers (largely worthless for sporting purposes),* imported into the United States in recent years, has contributed greatly to lawlessness.

(8) That the lack of adequate Federal control over interstate and foreign commerce in highly destructive weapons (such as bazookas, mortars, anti-tank guns, and so forth, and destructive devices such as explosive or incendiary grenades, bombs, missiles, and so forth) has allowed such weapons and devices to fall into the hands of lawless persons, . . .

. . .

(b) The Congress further hereby declares that the purpose of this Title is to cope with the conditions referred to in the foregoing subsection, and that it is not the purpose of this Title to place any undue or unnecessary Federal restrictions or burdens on law abiding citizens with respect to the acquisition, possession, or use of firearms '*appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity*' . . ." (Emphasis ours.)

In the United States brief before the Court of Appeals it began as follows:

"Defendant, Appellant Bobby Eugene Gordon was convicted by a jury of two counts of Title 18, U. S. Code, Section 1202(a) App. and Section 922 . . ."

The above is true. The United States charged Petitioner with possession of these guns in violation of Section 1202, but as stated in their brief before the

Court of Appeals they apparently went to part IV (or, Section 922), to allege the interstate commerce connection.

We think the Congress knew what it was doing when it passed this omnibus law. Section 922 made it a violation for a convicted felon to receive a firearm "which had been shipped or transported in interstate or foreign commerce." It specifically exempted shotguns and rifles which the receiver intended to use solely for "sporting, recreational or cultural purposes." Under Title IV a convicted felon receiving a shotgun or rifle which he intended to use solely for sporting, recreational or cultural purposes was not violating this section. If he changed his mind and used the gun for purposes other than sporting, recreational or cultural purposes he still was not violating Title IV. Other than the Court might question his intent at the time he received the guns. However, Title VII took care of this situation. If a convicted felon owned a shotgun or rifle at the time this omnibus law was passed or received one afterwards and if he used these guns in a way that affected interstate commerce, then he was in violation of Title VII. Any other construction would lead to a situation that a convicted felon may receive a shotgun or rifle which has moved in interstate commerce and which he intends to use solely for hunting, sporting or recreational purposes and in receiving it he is not violating any law. However, upon receipt of same, according to the United States interpretation, and according to the interpretation of the District Court and the United States Circuit Court of

Appeals, he would be in immediate violation of Title VII. As we interpret Title VII he would become in violation only if his possession was either in interstate commerce or affecting interstate commerce.

There is no indication that Bobby Eugene Gordon or his family were using these guns in any way which affected interstate commerce.

We are glad that we live in the United States where when we think there has been a gross miscarriage of justice, we can appeal the case all the way to the Supreme Court of the United States.

Respectfully submitted,

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